No. 82-698

IN THE

Supreme Court of the United States

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October Term, 1982

WAYNE N. HOWARD and MICHAEL E. TRAUSCHT,
Petitioners and Cross-Respondents,

v.

WALTER ROBERT TAYLOR,
Respondent and Cross-Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

PETITIONERS' REPLY BRIEF

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STATEMENT OF THE CASE

The Tenth Circuit's opinion is now reported as *Taylor v. Gilmartin*, 686 F.2d 1346 (10th Cir. 1982).

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S RESERVATION OF AN IMPORTANT QUESTION OF LAW IS AN IMPORTANT CONSIDERATION.

The fact that this Court has reserved decision on a question is simply an expression of the fact that there has been no definitive decision on an important point of law. This reason for review is clearly within the contemplation of Sup. Ct. R. 17.1(c).

Even if that were not the case, Respondent's argument is still without merit, as it proceeds upon the assumption that the Court's discretion is limited by Sup. Ct. R. 17.1. This is patently untrue, as Sup. Ct. R. 17.1 expressly provides: "The following, *while neither controlling nor fully measuring the Court's discretion*, indicate the character of the reasons that will be considered." The questions raised in the Petition are within the ambit of the Court's review, and their character is such that certiorari should be granted.

II. THE TENTH CIRCUIT'S OPINION IS IN DIRECT CONFLICT WITH PREVIOUS OPINIONS OF THIS COURT.

Respondent incorrectly characterizes Petitioners' argument as being based upon the proposition that Respondent's failure to name Judge Benson as a co-defendant or co-conspirator eliminates the possibility of state action and therefore renders the alleged conspiracy among Petitioners private.

The fact that Judge Benson was neither a named defendant nor co-conspirator is cogent evidence of the fact that even Respondent did not consider the level of state activity presented by this case to rise to the level found in cases where "state action" was found. That fact alone is not, however, the core of Petitioners' argument.

As a result of over 100 years of Fourteenth Amendment and Civil Rights litigation, the term "state action" has come to be a term of art. As such, the term is more accurately perceived as a conclusion arrived at based upon the existence or absence of other facts rather than a fact in and of itself.

Finding "state action" (or its absence) requires in every case an examination of the particular facts to arrive at the

conclusion that the force of the state dictated a Constitutionally impermissible result. If that is the case, then the state becomes responsible for otherwise private acts. This principle is the single unifying analytical thread running throughout all the "state action" cases involving both state officials and private persons.

Recent opinions of this Court have begun to consider the question of "state action" in terms of whether or not the acts in issue were "fairly attributable to the state," *see, e.g., Rendell-Baker v. Kohn*, ___ U.S. ___, 102 S. Ct. 2764 (1982). The change in terminology in no way changes the factors implicit in consideration of the issue, but it is respectfully submitted that it reflects the nature of the analysis necessary with greater clarity.

Respondent's argument is based upon the proposition that a judge was involved in this matter; that judges are state officials, and therefore any act by the judge is "state action."

This simplistic analysis fails, first because the presence of the state in the factual setting of a case cannot, by itself, constitute "state action." If this were not true, the Court's decisions in a number of cases, including among others, *Evans v. Abney*, 396 U.S. 435 (1970); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) and *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974), would necessarily have been directly contrary to the result which was reached.

Second, Respondent's argument (and the opinion of the Tenth Circuit) fail to consider the extent and character of Judge Benson's involvement, an examination necessary in any "state action analysis." Notwithstanding the fact that the Tenth Circuit considered Judge Benson's involvement too peripheral to be "state action" or action taken "under color

of state law", it nevertheless held that a lesser level of state involvement was adequate to implicate the state via the Fourteenth Amendment for purposes of § 1985, erroneously relying upon *United States v. Guest*, 383 U.S. 745 (1966).

As stated in the Petition, *Guest* presented facts amounting to active state participation, whereby the state *caused* the result complained of. That case does not stand for the proposition that the mere incidental presence of state officials, apart from any Constitutionally impermissible results mandated by the state through those officials, constitutes "state action."

The anomaly presented by the Tenth Circuit's analysis of this case in light of past precedent, plus the fact that there was no evidence at all that Judge Benson ordered or directed any of the alleged deprivations of Respondent's Constitutional rights by Petitioners, lies at the base of Petitioners' argument, is in direct conflict with previous decisions of this Court, and furnishes a compelling reason for review of the Tenth Circuit's decision by this Court.

III. THE DECISION BELOW DOES CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In response to Petitioners' argument that there is great divergence among the Courts of Appeals of other circuits, Respondent asserts that the cases cited are factually distinguishable, and therefore, inapposite.

It is demonstrably true that no case cited in the Petition is factually identical to the instant matter. It is equally true that these cases were cited as illustrations of the positions taken on the *law* involved on this issue by the various circuits, and not for the proposition that any of them govern

this matter by virtue of their factual congruence.

As noted in the Petition, there are no less than three positions prevailing in various Circuits (and a conflict in the Tenth Circuit) on the level of state action, if any, required under § 1985. Respondent's attempted response does not even address that issue, and is really no response at all.

IV. RESPONDENT'S FOURTH ARGUMENT IS YET ANOTHER ATTEMPT TO RAISE AN ISSUE FOR THE FIRST TIME ON APPEAL, AND SHOULD NOT EVEN BE CONSIDERED.

Respondent's Complaint and Response to the Motion for Summary Judgment did not allege or demonstrate that an object of the alleged conspiracy was to deprive him of his right to interstate travel. No attempt was ever made to amend to include such an allegation. When faced with a Motion for Summary Judgment on the § 1985 claim, Respondent produced no affidavits or other information to support a claim based on interference with interstate travel, and thereby elected to rest on the pleadings on this point. No attempt was made to preserve the point in the Statement of Facts relied upon.

This point was raised for the first time on appeal before the Tenth Circuit, where it was dealt with summarily as not warranted by the facts. Respondent is once more attempting to raise an issue for the first time on appeal, and should not now be heard to complain that he failed to do below that which *might* have been allowed if done at an appropriate time. As the Tenth Circuit observed:

> Furthermore plaintiff did not allege in his complaint that an object of defendants' conspiracy was to deprive him of his right to travel interstate. He now urges this as a basis to uphold his claim under § 1985(3). However,

the facts do not lend themselves to a claim of interference with this right.

Taylor v. Gilmartin, supra, 686 F.2d at 1358.

CONCLUSION

Respondent's Brief in Opposition urges no substantial reasons for denial of the Petition for Writ of Certiorari, and in most instances, fails to make any relevant response. Petitioners, therefore, pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,
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December, 1982.

CERTIFICATE OF SERVICE

The undersigned Albert R. Vermeire, a member of the Bar of this Court and counsel of record for Wayne N. Howard, Petitioner and Cross-Respondent herein, hereby certifies that on the 16th day of December, 1982, he caused to be served the foregoing Petitioners' Reply Brief on all parties to this appeal by mailing three copies thereof by First Class mail, postage prepaid, addressed to their attorneys, as follows:

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